RENOFAC BUILDER (M) SDN BHD

v.

CHASE PERDANA BHD

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S5-22-740 OF 1998]
22 APRIL 1999

CIVIL PROCEDURE: *Summary judgment - Grant of - Application for summary judgment filed when conditional appearance still subsisting - Whether application premature - Whether materially flawed - Rules of the High Court 1980, O. 14*

On 22 December 1998, the plaintiff filed a writ of summons against the defendant which was duly served. On 23 December 1998, the defendant entered a conditional appearance, and thereafter duly applied to set aside the plaintiff's writ. On 9 January 1999, whilst the conditional appearance of the defendant was still subsisting, the plaintiff applied for summary judgment under O. 14, Rules of the High Court 1980. Both applications were heard and dismissed by the senior assistant registrar, whereupon the plaintiff appealed against the dismissal of the O. 14 application.

Held:

[1] The plaintiff's O. 14 application was materially flawed in that it was made too prematurely. The application was premature as the conditional appearance of the defendant was still subsisting when the application was filed. This, clearly, is not an irregularity which could "be condoned".

[Appeal dismissed.]

Case(s) referred to:
Sungei Way Leasing Sdn Bhd v. Sena Land Development Sdn Bhd [1989] 2 CLJ 871 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

Other source(s) referred to:
Supreme Court Practice, Malaysian Edition (The White Book), p 133, para 14/1/2

For the plaintiff - K Goik; M/s Malik & Partners
For the defendant - Yee Teck Fah (Ong Gek Lin with him); M/s Yee Teck Fah & Co

Reported by WA Sharif

JUDGMENT

James Foong J

This is an appeal by the plaintiff against the order of the Senior Assistant Registrar ('the SAR') in dismissing its O. 14 application made under the Rules of the High Court 1980 ('the RHC').

The primary issue taken here and below by the defendant flows from the following chronology of events:

(1) On 22 December 1998 the plaintiff filed a writ of summons against the defendant and it was duly served on the latter on 25 December 1998.

(2) On 23 December 1998, the defendant entered, with leave of court, a conditional appearance.

(3) On 29 December 1998, duly complying with the term set by the court for the conditional appearance, the defendant filed an application (encl 5) to set aside the plaintiff's writ of summons.

(4) On 9 January 1999, the plaintiff filed an application (encl 8) under O. 14 of RHC against the defendant.

(5) Enclosures 5 and 8 respectively were heard consecutively by the SAR on 27 January 1999.

(6) Both enclosures were dismissed.

It is and was the defendent's contention that the plaintiff's O. 14 application was filed prematurely, when the conditional appearance of the defendant was still subsisting.

I am in full agreement with this argument. Suffice me just to quote from the *Supreme Court Practice, Malaysian Edition* (The White Book) at p. 133, under the second para. of 14/1/2 the following:

> (a) Appearance by defendant – This is a preliminary necessity to apply for summary judgment under O. 14. The words of r. 1 preclude an application under O. 14 before the defendant has appeared, ie has either entered an unconditional appearance or his conditional appearance has become unconditional. If there is no appearance, judgment in default of appearance may be entered under O. 13. If the appearance is conditional, the plaintiff cannot apply under O. 14 so long as the appearance is conditional (*Richard v. Scussok*, per Channel J at Chamber, 15 December 1901).

Faced with this well established principle the plaintiff's counsel attempted to convince me with the ruling made by Edgar Joseph Jr J (as he then was) in *Sungei Way Leasing Sdn Bhd v. Sena Land Development Sdn Bhd* [1989] 2 CLJ 871; [1989] 3 MLJ 37 which treated a premature O. 14 application, although with no appearance filed, as an irregularity which could 'be condoned'. I cannot accept this proposition. I am of the view that this *Sungei Way* case can be distinguished on two grounds. Firstly, there was a defence filed when in our present situation, the defendant had not taken such step in the proceeding. Secondly, the primary issue of contention raised by the defendant in this O. 14 application is this allegation of premature application. With this, I am not convinced that the argument on the merits of the O. 14 application by the defendant having been raised (as in the *Sungei Way* case) can override the material flaw in the plaintiff's application of it being made too prematurely, ie when notice of conditional appearance was made known to the plaintiff, and the application by the defendant to set aside the writ of summons was not disposed of.

Accordingly, I hereby dismiss this plaintiff's appeal with costs.